IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 7TH AUGUST 2007 / 16TH SRAVANA 1929

WP(C).No. 27653 of 2005(P)

AGAINST THE ORDER DATED 25/06/05 IN IA.928/04 IN OS.217/2003 of MUNSIFF'S COURT, KANJIRAPPALLY

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PETITIONER:

P.JOHN PAUL, PARAYILMEL HOUSE,
CHELIKKUZHY BHAGOM, MUNDAKKAYAM VILLAGE.

BY ADV. SRI.V.B.PREMACHANDRAN
SRI.P.K.SIVADASAN NAIR
SRI.K.N.GOVINDANKUTTY MENON
SRI.S.MADHAVAN NAIR

RESPONDENT:

SOMAN, KURUMALAKKAVU HOUSE,
PUNCHAVAYAL P.O., ERUMELY NORTH VILLAGE.

BY ADV. SRI.LIJI.J.VADAKEDOM

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.27653/05

APPENDIX

PETITIONER'S EXTS:

EXT.P1 – TRUE COPY OF AGREEMENT DT. 12.1.02

EXT.P2 – TRUE COPY OF ORDER IN I.A.928/04 IN O.S.217/02 OF MUNSIFF, KANJIRAPPALLY, DT.25.6.05.

/TRUE COPY/

PIUS C. KURIAKOSE, J.

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W.P.(C)No.27653 OF 2005

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DATED THIS THE 7th AUGUST, 2007

J U D G M E N T

Whether the document produced as Ext.P1 is an agreement or a bond is the question which arises in this Writ Petition. Whether subscription of his signature to Ext.P1 by the scribe will amount to attestation for the purpose of Section 2(a) of the Kerala Stamp Act is an incidental question.

2. Under Ext.P2 order, the learned Munsiff construed Ext.P1 as an agreement and found that the stamp duty paid on the same under Article 5(c) of the Schedule to the Kerala Stamp Act, 1959 is proper. The defendant who is aggrieved has filed this Writ Petition under Article 227.

3. I have gone through Ext.P1. Ext.P1 is styled as an agreement and it is recorded therein that on the same day of its execution, the sum of Rs.25,000/- mentioned therein was received by the petitioner from the respondent. Ext.P1 records an undertaking that the amount so received will be repaid within a stipulated period together with interest.

4. Heard Sri.V.B.Premachandran, learned counsel for the

petitioner and Sri.Liji J.Vadakkedom, learned counsel for the respondent.

5. Sri.Premachandran would invite my attention to the definition of bond given under Section 2(a) of the Kerala Stamp Act and submit that Ext.P1 being a document whereby the petitioner has obliged himself to pay the money can be construed only as a bond. The amount is paid on the same day, submitted counsel.

6. Sri.Liji J.Vadakkedom per contra would submit that Ext.P1 does not disclose that payment of money is simultaneous with its execution. Ext.P1 only acknowledges payment of money made on the same day at an earlier point of time. The learned counsel further submitted that nobody has attested execution of Ext.P1 and at any rate Ext.P1 cannot be a bond. Counsel relied on the judgment of the Supreme Court in **Abdul Jabbar v. Venkata Sastri** (AIR 1969 SC 1147) in that context.

7. I find that it is relying on the judgment of this Court in **Mathai Mathew v. Thampi** (1989 (1) KLT 138) that the learned Munsiff construed Ext.P1 as an agreement. I do not find any infirmity in the view taken by the learned Munsiff since it is not possible to say from Ext.P1 that the liability is created by virtue of Ext.P1 only. There is another good reason as to why Ext.P1 cannot be construed as a bond

at all. The definition of the term "bond" given under Section 2(a) of the Kerala Stamp Act is an inclusive definition which reads as follows:-

> "2. **Definitions.--**In this Act, unless the context otherwise requires,--
>
> (a) "bond" includes--
>
> (i) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;
>
> (ii) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and
>
> (iii) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another;"

Obviously, Ext.P1 does not come under sub-clause (i) or sub-clause (iii) of Clause (a) of Section 2. The argument of the learned counsel for the petitioner is also that Ext.P1 comes within sub-clause (ii) of Clause (a). Ext.P1 is styled as an agreement, the first party to which is the petitioner herein and the second party is the respondent. Execution of Ext.P1 becomes complete only when both parties subscribe their signature to the same. One T.C.Issac, scribe of Ext.P1 has also put his signature to Ext.P1, describing himself as . The question is whether Sri.T.C.Issac is an attesting

witness to Ext.P1. The attestation contemplated under Section 2(a)(ii) of the Act is attestation of the execution. By looking at the document itself, it is not difficult to find that the second party to Ext.P1 has subscribed his signature to Ext.P1 only after Sri.T.C.Issac has signed Ext.P1 as " . The word "attest" means: to bear witness, to testify, to authenticate by signing as a witness etc. There is nothing at all in Ext.P1 to indicate that Sri.T.C.Issac put his signature on Ext.P1 animo attestandi, i.e., for the purpose of attesting that he has seen the executant sign or for certifying that he has received from the executant a personal acknowledgment regarding his signature. Probabilities are that put his signature on the document only for certifying that the handwriting in which the document is written belongs to him. Sri.T.C.Issac therefore cannot be an attesting witness for the purpose of Section 2(a)(ii). The above view has the support of the judgment of the Supreme Court in **Abdul Jabbar**'s case (supra).

The challenge against Ext.P2 fails and the Writ Petition will stand dismissed. No costs.

(PIUS C.KURIAKOSE, JUDGE)

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Ext.P2 order construing Ext.P1 document as an agreement and not as a bond is under challenge in this Writ Petition under Article 227 of the Constituion initiated by the defendant.

2. I have gone through Ext.P1. Ext.P1 is styled as an agreement and it is recorded therein that on the same day of execution of Ext.P1, a sum of Rs.25,000/- was received by the petitioner from the respondent and the document is being executed recording the agreement that the amount so received will be repaid within a stipulated period together with interest.

3. The learned counsel for the petitioner submitted that it is evident from Ext.P1 itself that the sum of Rs.25,000/- mentioned therein is paid against execution of Ext.P1 and therefore it is not correct to say that the liability was a pre-existing liability.

4. Sri.Liji Abraham, counsel for the respondent would submit that it is not stated in Ext.P1 that the amount is paid and received under Ext.P1. What is stated is only that on the same day the amount is paid and the document at any rate is capable of being construed as an agreement. The learned counsel also invited my attention to the definition clause in the Kerala Stamp Act. "Bond" necessarily has to be an instrument attested by a witness unless it falls within Section 2(a)

(i) of the Kerala Stamp Act. Admittedly, in this case, the instrument does not fall within Section 2(a)(i). If the document is to be construed as a bond, the same has to fall either within Section 2(a)(ii) or Section 2(a)(iii). Counsel submitted that Ext.P1 is not attested by any witness. Strong reliance was placed by the learned counsel on the judgment of the Supreme Court in T.U.Issac whose name also figures in Ext.P1 is not an attesting witness who attests the execution of Ext.P1 by the petitioner. The signature of Issac has been put only for certifying that he is the scribe, submitted counsel.

5. I find considerable merit in the above submission. Looking at Ext.P1 that way, it will have to be found that Ext.P1 is not a bond. At any rate, Ext.P1 is capable of being construed as an agreement also. I follow the principle laid down by this Court in that if two constructions are possible, the construction which is more favourable to the assessee shall be adopted.

The impugned order is confirmed and the Writ Petition is dismissed. No costs.